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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	No. CR 07-0328 MHP
	)	
Plaintiff,	)	UNITED STATES' SENTENCING
	)	MEMORANDUM
v.	)	
	)	
ERNESTO R. RODRIGUEZ,	)	Hearing: January 7, 2008
	)	Time: 9:00 a.m.
Defendant.	)	Courtroom: 15, 18 <sup>th</sup> Floor
	)	Hon. Marilyn Hall Patel

I. INTRODUCTION

On July 2, 2007, defendant Ernesto R. Rodriguez pled guilty to one count of abusive sexual contact, in violation of 18 U.S.C. § 2244(a)(2), pursuant to Rules 11(c)(1)(C) of the Federal Rules of Criminal Procedure. This Court has set January 7, 2008, at 9:00 a.m. as the date for judgment and sentencing. The government submits the following sentencing memorandum in order to advise the Court of the government's sentencing guideline calculations, any objections to the presentence report ("PSR"), and its sentencing recommendation.

SENTENCING MEMORANDUM  
CR 07-0328 MHP

## II. GUIDELINES CALCULATION

The government has calculated that the defendant's criminal history category is a I, and the adjusted offense level under the Sentencing Guidelines is 31. PSR ¶ 4-7. This places the defendant in Zone D of the Sentencing Guidelines, with a range of 108 to 135 months of imprisonment. Pursuant to U.S.S.G. § 5G1.1(a), where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence. U.S.S.G. § 5G1.1(a). This sets the guideline range for the defendant at the statutory maximum of 36 months.

Because the maximum term of imprisonment for the instant offense is 36 months custody followed by one year of supervised release, and for the reasons below, the government is recommending a sentence of 36 months custody and one year of supervised release. Such a sentence will properly account for the factors in Title 18, Section 3553(a).

## III. BACKGROUND

### 1. Defendant's Offense Conduct.

On February 13, 2007, the defendant picked up a female prostitute near the corner of Pine and Van Ness Streets in San Francisco in a dark green Geo Metro. PSR ¶ 6. While driving, defendant told victim his name was Carlos and then started using his cell phone like a walkie-talkie, speaking into it and saying, "10-4, we've got a walker." He did this as he drove the victim towards the Presidio Trust, and eventually identified himself as a police officer and asked to see her ID. Id. He told her that he would not arrest her if she performed sexual services for him. Id.. She told him that she would rather be arrested. Id. Defendant drove to the area of Pop Hicks Field on the Presidio, pulled his pants down, and took the victim by the back of her head and forced her to perform oral sex. Id.

The victim attempted to escape from the car, but defendant held the switch to the door locks down so she could not leave the car. PSR ¶ 6. The victim then struck defendant in his temple, and he struck her in the face and placed her in a headlock. PSR ¶ 7. He threatened her by saying, "If you don't stop struggling, I'm really going to hurt you." Id. The victim was able to jump out of the car and run to call the police. Id. The United States Park Police issued a

1 look-out for the dark green Geo, and it was spotted going north on Ocean Beach at about 2:30  
 2 a.m. After a stop of the vehicle, a search of the defendant turned up the victim's driver's license  
 3 in his right front pocket. Id.

4 2. Defendant's Past Criminal History.

5 The defendant has a misdemeanor battery conviction from 1999. PSR ¶ 28. The facts of  
 6 that incident indicate that the defendant struck his girlfriend in the face. Id. That report also  
 7 indicates that the defendant had struck that victim on ten prior occasions. Id.

8 IV. ARGUMENT

9 THE COURT SHOULD IMPOSE A SUBSTANTIAL CUSTODIAL SENTENCE.

10 After Booker, a sentencing court must use the Guidelines as a "starting point." The  
 11 Guidelines do not dictate a presumptively reasonable sentence. Rather, the Guidelines are  
 12 simply one factor for the sentencing court to consider. United States v. Zavala, 443 F.3d 1165,  
 13 1170-71 (9<sup>th</sup> Cir. 2006). As the Ninth Circuit recently held, sentencing courts "must properly use  
 14 the Guideline calculation as advisory and start there, but they must not accord it greater weight  
 15 than they accord the other § 3553(a) factors. Rather, they must consider all of the information  
 16 before them, as they used to do, and then reach for the correct sentences under all of the  
 17 circumstances." Id. at 1171.

18 Under 18 U.S.C. § 3553(a), the sentencing court must consider the following factors in  
 19 addition to the sentence specified by the Guidelines:

- 20 1. "the nature and circumstances of the offense";
- 21 2. "the history and characteristics of the defendant";
- 22 3. "the need for the sentence imposed . . . to reflect the seriousness of the  
 23 offense, to promote respect for the law, and to provide just punishment for  
 24 the offense," to deter; "to protect the public . . .";
- 25 4. and to provide treatment and rehabilitation.

26 A. The Defendant Has Earned A Sentence of 36 Months in Custody.

27 As discussed above in Section II, the Guideline range for the offense conduct is 36  
 28 months. The government recommends a custodial sentence of 36 months. The defendant's

1 conduct is very serious, and 36 months is a substantial, appropriate, and reasonable sentence. He  
2 has earned this substantial custodial sentence for the following reasons:

3 1. “the nature and circumstances of the offense”

4 The instant offense occurred after the defendant had solicited the victim to engage in  
5 sexual services. Although the abusive sexual contact was not the level of some of the more  
6 severe sexual assaults, it was nonetheless a violent act where the defendant used sheer physical  
7 force and fear to have sexual contact with the victim. Such violent behavior is the sort that  
8 injects fright into any community and is of the most abhorrent of crimes. Given the seriousness  
9 of this offense, a substantial period of custody and a mandatory registration as a sexual offender  
10 pursuant to California state law should be included as a condition of sentencing.

11 2. “the history and characteristics of the defendant”

12 The history of the defendant includes an education and professional life in the San  
13 Francisco Bay Area. His sole criminal conviction was for battery in 1999. That conviction,  
14 however, followed numerous instances of violent behavior against that victim, his girlfriend.  
15 PSR ¶ 28. The defendant’s violence against women continued into subsequent relationships. In  
16 fact, the defendant candidly admits that he has committed domestic abuse against his current  
17 girlfriend. Id. at ¶ 33. This track record of violence against women, coupled with the instant  
18 offense, demonstrates that the defendant has a need for mental health treatment as part of his  
19 custodial sentence and his supervised release. The defendant has been participating in individual  
20 psychotherapy while on pretrial release. Id. at ¶ 38. He has indicated that he is benefitting from  
21 the counseling because he is able to examine some of the underlying issues for his behavior and  
22 assess how his past experiences may have contributed to the instant offense. Id.

23 3. “the need for the sentence imposed . . . to reflect the seriousness of the offense, to  
24 promote respect for the law,” to deter; and “to protect the public,” and to provide  
25 treatment and rehabilitation.

26 The Court should find that a substantial period of custody is necessary “to reflect the  
27 seriousness of the offense, to promote respect for the law, and to provide just punishment for the  
28 offense.” 18 U.S.C. § 3553(a). The defendant not only used violence as a means to obtain

1 sexual contact with the victim, he also posed as a peace officer. In making false representations  
2 as an officer in order to perpetuate his unlawful conduct, the defendant contributed to the erosion  
3 of the confidence and trust that a community has in police officers. This conduct shows a clear  
4 disregard for the rule of law and demonstrates a need for a sentence that will promote respect for  
5 the law. It also demonstrates the need for the sentence to deter this sort of reckless, dangerous  
6 conduct, and to protect the public from individuals who use the role of a peace officer as a guise  
7 for criminal conduct. The defendant's registration as a sexual offender will serve to protect the  
8 public from this sort of conduct.

9 The government's recommendation of 36 months serves the goals of punishment under §  
10 3553(a). This sentence – three years – represents a substantial amount of prison time as  
11 punishment. This recommendation incorporates the aggravating factors of the offense while at  
12 the same time recognizing that defendant has admitted guilt early in the case and has already  
13 commenced treatment for his mental health problems. The government submits that such  
14 treatment will enhance defendant's opportunity for successful rehabilitation.

#### 15 V. CONCLUSION

16 When balancing all of the factors of § 3553(a), the government submits that this sentence  
17 will serve the goals of deterrence, punishment and community safety, while at the same time  
18 taking into account the nature of the offender and the opportunity for rehabilitation. For the  
19 reasons set forth above, the government recommends the Court impose a custodial sentence of  
20 36 months, and a supervised release term of one year.

21  
22 DATED: December 31, 2007

Respectfully submitted,

23  
24 SCOTT N. SCHOOLS  
United States Attorney

25 /s/ Derek R. Owens

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DEREK R. OWENS  
27 Assistant United States Attorney  
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